UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of L.I.F.E., Inc., Charging Party, and L.I.F.E., Inc. Complainant-Intervenor v. Mercantile-Safe Deposit and Trust Co., et al., Respondents.	HUDALJ 03-91-0235-1 Decided: June 10, 1993

Jo Ann Halberstadter, Esq.
For the Charging Party

Lance Brown, Esq.
For the Complainant-Intervenor

Peter S. Saucier, Esq.
Scott Kamins, Esq.
For the Respondents

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

INITIAL DECISION

Statement of the Case

This matter arose as a result of a complaint filed on March 25, 1991, by Thomas C. Noto, Executive Director of L.I.F.E., Inc. ("L.I.F.E." or "Complainant"), on behalf of the Complainant, with the U. S. Department of Housing and Urban Development ("HUD" or "the Charging Party"). The complaint alleges that Respondents Mercantile-Safe Deposit & Trust Company ("Mercantile" or "Bank"), Thomas M. Esposito, Assistant Vice-President of Mercantile, and each officer and board member of Mercantile, discriminated against L.I.F.E. by refusing to make available a loan for the purchase of a dwelling on the basis of the handicaps of the persons to whom L.I.F.E. provides services, in violation of the Fair Housing

Act, as amended (the "Act" or the "Fair Housing Act"), 42 U.S.C. §§ 3601, *et seq.* (1989).

After an investigation, HUD issued a Determination of Reasonable Cause and Charge of Discrimination ("Charge") on October 9, 1992. Respondents filed an Answer to the Charge of Discrimination ("Answer") denying any unlawful discrimination.

A hearing in this matter was held in Baltimore, Maryland, on January 26, 1993. At the conclusion of the hearing the parties were instructed to file post-hearing briefs by March 12, 1993. After agreeing to extend this date, all the parties filed post-hearing briefs by March 17, 1993. On March 31, 1993, Respondents filed a Motion to Exclude Evidence, requesting that certain information contained in the Complainant's brief be excluded. On April 13, 1993, I issued an Order Excluding Evidence and closed the record.

Based upon the entire record, including my observation of the witnesses and their demeanor, and my evaluation of the evidence, I make the following findings.

Findings of Fact

L.I.F.E. is a non-profit corporation, incorporated under the laws of Maryland, whose primary business purpose is to provide assistance to persons with handicaps and their families. This assistance includes, among other things, the purchase and conversion of residential homes to group homes, and providing housing and related services for handicapped persons who occupy the group homes. (C 1, pp 1-2).[1] Thomas C. Noto is the Executive Director of L.I.F.E. (Tr. 30).

Mercantile is a bank incorporated in the State of Maryland and is a wholly owned subsidiary of Mercantile Bankshares Corporation. (Charge ¶ 6; Answer ¶ 6). At all times relevant to this Complaint, Respondent Thomas M. Esposito was the Assistant Vice President of the Bank and a commercial lending officer. (Charge ¶ 8; Answer ¶ 8; Tr. 121); Respondent Douglas W. Dodge was the President and Chief Operating Officer of the Bank (Charge ¶ 9; Answer ¶ 9); Respondent H. Furlong Baldwin was Chairman of the Board and Chief Executive Officer of the Bank (Charge ¶ 10; Answer ¶ 10); Respondent Edward K. Dunn, Jr., was Vice Chairman of the Board of Directors of the Bank (Charge ¶ 11; Answer ¶ 11); and Respondents William J. McCarthy, Morris W. Offit, James M. O'Neill, Christian H. Poindexter, William B. Potter, William C.
Richardson, Bishop L. Robinson, Brian B. Topping, J.K. Wilson, Calman J. Zamoiski, Jr., Thomas M. Bancroft, Jr., and Richard O. Berndt were members of the Board of Directors of the Bank (Charge ¶ 12; Answer ¶ 12).

Mercantile's business activity includes providing loans for the purchase of residential real estate. (Charge ¶ 7; Answer ¶ 7).

L.I.F.E. has been banking with Mercantile since June of 1983 and, until the incidents occurred that are the subject of this case, had used Mercantile as the exclusive depository of its funds. L.I.F.E. and the Bank had a very good business relationship. (Tr. 50).

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[1]The following abbreviations are used in this decision: "Tr." for Transcript followed by page numbers; "C" for Court's exhibits followed by the exhibit number and, where appropriate, page numbers; "G" for the Charging Party's exhibits followed by the exhibit number and, where appropriate, the page numbers; and "R" for Respondents' exhibits followed by the exhibit number and, where appropriate, the page numbers.

In October of 1990, L.I.F.E. entered into a contractual arrangement with the State of Maryland to provide two group homes, each of which would house about eight mentally retarded adults. (Tr. 31).

In December of 1990, L.I.F.E. located two single family residential properties which were suitable to be used as group homes. (Tr. 31-32). One of the properties was located at 3561 Centennial Lane, Ellicott City, Howard County, Maryland ("Centennial property") and is not at issue in this case. The other property, which is the subject of this case, was located at 3402 Font Hill Drive, Ellicott City, Howard County, Maryland ("Font Hill property"). (C 1, p 2).

Noto and a hygienist employed by the State of Maryland determined that the Font Hill property was large enough to house seven residents. (Tr. 31). The property was large enough to meet licensing requirements, was situated in such a way that the residents would have a fairly large backyard, was in good repair, and was something in which L.I.F.E. felt it could take pride. (Tr. 31-32).

In the group homes, L.I.F.E. would collect payment for room and board from the residents and, in turn, would furnish the residents, in addition to room and board, with a limited amount of medical services, including a nurse, physical checks, and psychiatric and neurological services. L.I.F.E. would take the residents to physicians for all types of medical care, and on weekdays all of the residents would be transported off-site to the Atlas Institute day program for schooling, training and other non-residential activities. (Tr. 67-68).

L.I.F.E. then negotiated the purchase of the properties and agreed on a price with the sellers. (Tr. 32).

Although L.I.F.E. had sufficient funds to buy both properties for cash, Cathy Wolf, Deputy Director of the Developmental Disabilities Administration of Maryland, advised Noto not to buy the two properties for cash, but to obtain mortgages on the properties. (Tr. 65-66).

Consequently, in early December of 1990, Noto contacted Denise Peak, Manager of Mercantile's Liberty Road branch, and told her he wanted a loan to purchase the two properties. (Tr. 32). Peak arranged for Noto to meet with Thomas M. Esposito who was Assistant Vice President of Mercantile and a commercial loan officer. Present at a meeting on December 9, 1990, were Noto, L.I.F.E. attorney Lance Brown, L.I.F.E. Deputy Director Pat Mosser Noto, Esposito, and Peak. They discussed the purposes for which the homes would be used and Esposito requested and obtained various documents from L.I.F.E. that were needed to begin the loan process. (Tr. 32-33).

Esposito, as a commercial lending officer, regularly made commercial loans to businesses. (Tr.121). He negotiated the financing of the two properties. (Tr. 122).

When seeking a commercial loan, the purchaser usually performs a title search prior to seeking financing in order to discover if there is a problem and if the property is appropriate for its proposed use. L.I.F.E. did not perform such title searches on the properties before seeking the financing. (Tr. 164-165).

By mid-January, 1991, Noto had not heard anything further on the status of the loan requests. He therefore contacted Peak to find out if any problems were causing the delay. (Tr. 33). Peak stated that there was no problem through Esposito, but when Esposito took it to his bosses there was a problem. (Tr. 34). Noto called Esposito and Esposito stated that there were several issues. Esposito said there was an issue as to what would happen if L.I.F.E. lost its funding, if it went "belly-up, if it could not pay its mortgage." Esposito said that the Bank did not want to put itself in the position of having "to put handicapped people on the street if [L.I.F.E.] could not make [its] loan commitments." In that conversation, or one around that time, Esposito also stated that the Bank identifies places it wants to put its money, and this is not a place it wants to put its money, and if the Bank did it this time Noto should not ask again. (Tr. 35).

Noto was not sure what the "problem" was, and was concerned that he might not be able to meet the scheduled February 11, 1991, closing date. He was particularly concerned with regard to the Centennial property because L.I.F.E. would incur additional expenses on the Centennial property if the closing occurred later than as scheduled. Noto thought that perhaps there was concern about the funding, so he called Esposito and told him that if he was worried about L.I.F.E.'s funding, he should contact Harold Adams, Acting Regional Director for Developmental Disabilities Administration for the Central Maryland Region. (Tr. 36-37, 40-41). L.I.F.E. agreed to assign $60,000 of its monies on deposit with Mercantile as additional collateral for both properties.
(C 1, p 2). When Noto asked why the additional collateral was necessary, Esposito replied that if the Bank were forced to foreclose on either of the properties, it would incur negative publicity as a result of putting handicapped people onto the street.
(C 1, p 2).

In its January 30, 1991, standard commercial commitment letter, Mercantile required L.I.F.E. to pledge $60,000 of its Money Market account with the Bank as additional collateral for both properties. (G 7, p 2). In the commitment letter, which dealt with both loans, the Bank agreed to provide the requested financing subject to the letter's terms and conditions. (C 1). This commitment letter stated, in part, that the Bank had the right to withdraw the loan

commitments if it determined, in its sole judgment, that the results of the appraisal, title search, or survey did not warrant granting the loans; or, if any terms and conditions of the loan commitments were not fulfilled; or, if settlement of the loans did not take place before February 28, 1991. (G 7, p 2;
C 1, p 2).

The Bank agreed to finance 70% of the contract price of the Font Hill property with a pledge of $24,000 of the additional collateral. Mercantile would have been at risk for less than 60% of the appraised value of the Font Hill property. (C 1, p 2).

Commercial loans are generally made to a business or an individual for business purposes. A bank, such as Mercantile, relies on the income or cash flow of the enterprise to service the debt. At Mercantile, commercial loans generally have a "straight line" basis, with level principal payments each month, plus interest on the outstanding balance. Commercial loans also typically have a three year "call-in" provision which enables the Bank to demand payment of the loans after three years. The terms offered on commercial loans are relatively short, generally no more than fifteen years. The Font Hill and Centennial loans had these features of commercial loans, and were for a period of ten years. (Tr. 123-124). The Bank treated these loans as commercial loans. (Tr. 125).

Noto rescheduled the closing dates for both properties to February 22, 1991, which resulted in the payment of additional costs for the Centennial property.
(Tr. 40-41).

Mercantile requested its legal counsel, Venable, Baetjer and Howard ("Venable"), to conduct a title search for each property. The Title Report, with an effective date of January 31, 1991, revealed that the Font Hill property was subject to a private restrictive covenant which provided, in part:

> The land shall be used for private single family residence purposes only and no building of any kind whatsoever shall be erected or maintained thereon except single family private dwelling houses, each dwelling being designed for occupancy for one family only. . . .

(G 28; C 1, p 3). The attorney for Venable who examined the titles and discovered the restrictive covenant was J. Paul Reiger. Reiger was the title agent with the title company, Chicago Title. In that capacity, he had signature authority to write title insurance policies through Venable. (Tr. 163-165). Reiger determined that Chicago Title would not insure the Font Hill property's title with the restrictive covenant present.
(Tr. 168-169). Reiger conveyed this information, including two methods for removing the restrictive covenant, to another Venable attorney, J. Michael Brennan. (Tr. 165-166). Without the restrictive covenant, Reiger would have issued title insurance on the Font Hill property.
(Tr. 170-171).

Esposito advised Noto about the restrictive covenant on the Font Hill property. Noto contacted Adams, who directed Noto to § 7-603, Subtitle 6, of the Health-General provisions

of the Annotated Code of Maryland ("Maryland Code § 7-603")[2] which, Adams said, provided that L.I.F.E.'s use of the property qualified as a single family dwelling. (Tr. 41).

On or about February 20, 1991, Noto advised Esposito of Maryland Code § 7-603, and suggested that Esposito call Adams. (Tr. 41-42). Esposito called Adams, who advised Esposito that there was a certification process that, when completed, would ensure that the property would be deemed a single family dwelling. (Tr. 112). Reiger examined Maryland Code § 7-603, and decided that it applied to zoning, but did not apply to private restrictive covenants. (Tr. 170).

Also on February 20, 1991, the Banking Executive Committee at Mercantile approved both the Centennial and Font Hill loans subject to certain conditions pertaining to L.I.F.E.'s state funding. (G 15). This approval was also subject to the terms of the January 30, 1991, commitment letter. (G 7).[3]

On February 21, 1991, the day before the scheduled closing on both properties, Esposito told Noto of the closing figures for the properties, which included purchasing the Font Hill property for cash, with no mortgage. (Tr. 42).

On February 22, 1991, after closing on the Centennial property,[4] Esposito told Noto that the Bank was not going to close on the Font Hill property. The L.I.F.E. representatives stated that they were ready to close on Font Hill, but Esposito repeated that the Bank was not. (Tr. 45; C 1, p 3). Noto asked for a statement in writing as to why the Font Hill property was not closing. He waited an hour while the Bank's attorney prepared a letter, a copy of which was given to L.I.F.E.'s attorney. (Tr. 46).

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[2]Subtitle 6 concerning "community-based residential programs" includes Maryland Code § 7-603, "designation as a single-family dwelling." That section states that public group homes, nonprofit private group homes, and alternative living units are:

* * *

> (b) Deemed single-family dwelling; location in all residential zones; not subject to special exceptions, conditional use permits, etc.--(1) To avoid discrimination in housing and to afford a natural, residential setting, a group home or an alternative living unit for individuals with developmental disability:
>
> (i) Is deemed conclusively a single-family dwelling;
> (ii) Is permitted to locate in all residential zones; and
> (iii) May not be subject to any special exception, conditional use permit, or procedure that differs from that required for a single-family dwelling.
>
> (2) The provision of separately identified living quarters for staff may not affect the conclusive designation as a single-family dwelling under paragraph (1)(i) of this subsection.
>
> (3) A general zoning ordinance, rule, or regulation of any political subdivision that conflicts with the provisions of this section or any rule or regulation that carries out the purpose of this section is superseded by this section to the extent of any conflict.

(G 17).

[3]The record does not demonstrate whether the Banking Executive Committee knew about the restrictive covenant on the Font Hill property when it approved the loan.

[4]The Centennial property title was fine, had no restrictive covenant, and the closing went through as scheduled. (Tr. 45, 165).

The letter dated February 22, 1991, from Mercantile's attorney to Esposito, stated that there was a title problem concerning the Font Hill property. The letter stated that there was a restrictive covenant in the existing deed which prohibits any use of the property other than for a single family residence. The letter went on to say that this is a private restrictive covenant which may be enforced by the neighbors, and that the restriction is not affected by zoning or subdivision regulations of Howard County. The letter suggested two methods for removing the covenant: obtaining written approval of all the neighbors in the subdivision, a "difficult" and "not a practical solution," or obtaining an order from the Circuit Court of Howard County which might involve "the delay and expense inherent in any litigation." The letter concluded by saying that the restrictive covenant would permit a neighbor to file suit to prevent L.I.F.E. from using the property in the manner it wished, and it was possible the neighbor would prevail.
(G 10).

Mercantile's counsel advised Mercantile that a neighbor could obtain an order enjoining L.I.F.E. from operating a group home and that Maryland courts have not declared such restrictive covenants to be void on their face as a matter of law.
(C 1, p 3).

By letter dated February 25, 1991, entitled "NOTICE OF STATEMENT FOR REASONS FOR CREDIT DENIAL," Mercantile advised L.I.F.E. that the Bank was

unable to extend credit on the Font Hill property at that time because of a title problem, and enclosed a copy of the February 22, 1991, letter from Venable to Esposito. (G 12).

By written and oral communications, the Bank and its attorneys informed Noto that he could resolve the title problem and renegotiate the loan if he were to have the restrictive covenant removed or declared void. (Tr. 75). The Bank and its attorneys also advised L.I.F.E. that the title problem at Font Hill could be resolved if L.I.F.E. were to submit controlling legal authority that the restrictive covenant could not be enforced against L.I.F.E. and its proposed use of the property. (C 1, p 3).

L.I.F.E. decided that it was too costly and time consuming to meet the conditions set forth in the letter of February 22, 1991. (Tr. 46). Noto obtained a copy of House Report 100-711, 100th Congress, 2d Session, on the Fair Housing Amendments Act of 1988. The House Report, in addressing the provisions prohibiting discrimination on the basis of handicap, states that the Act "is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community." Noto forwarded the House Report to his attorney, who, in turn, was to forward it to Mercantile and its attorneys. (Tr. 46-47).

By letter dated March 14, 1991, Mercantile advised L.I.F.E.'s counsel that Mercantile was willing to settle the Font Hill loan if it were shown that the title problem had been resolved. (G 13). By letter dated March 15, 1991, Venable advised L.I.F.E.'s counsel that if he provided legal authority that the private restrictive covenant would not be enforced in a Maryland court, Venable would advise the Bank that the title problem had been resolved. (G 16).

As of March 18, 1991, Mercantile was insisting that the restrictive covenant issue be resolved in order to settle on the Font Hill property. (Tr. 78). L.I.F.E. considered such a course to be too expensive and therefore notified the Bank that L.I.F.E. intended to seek

financing elsewhere and to pursue legal redress under the Act. (Tr. 77; G 14).

L.I.F.E. made no attempt to get the restrictive covenant altered or removed and did not attempt to contact neighbors of the Font Hill property to get their written approval of the group home. (Tr. 73-74).

Discussion

I. Governing Legal Framework

Congress passed the Fair Housing Act as Title VIII of the Civil Rights Act of 1968 to "[e]nsure the removal of artificial, arbitrary, and unnecessary barriers when the

barriers operate invidiously to discriminate on the basis of impermissible characteristics." *United States v. Parma,* 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), *rev'd on other grounds,* 661 F.2d 562 (6th Cir.), *cert. denied,* 465 U.S. 926 (1982); *see also United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975). The Act was designed to prohibit "all forms of discrimination [even the] simple-minded." *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir.), *cert. denied*, 419 U.S. 1021, 1027 (1974).

On September 13, 1988, the Act was amended effective March 12, 1989, to prohibit housing practices that discriminate on the basis of handicap. 42 U.S.C. §§ 3601-19. In amending the Act, Congress stated

> The Fair Housing Amendments Act, like Section 504 of the Rehabilitation Act of 1973, as amended, is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.

H.R. Rep. No. 100-711, 100th Cong., 2d Sess. 18 (1988) (footnote omitted).

The Charging Party alleges handicap[5] discrimination based on violations of 42 U.S.C. § 3605. This section of the Act makes it unlawful:

> for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of. . .handicap.

42 U.S.C. § 3605(a). *See also* 24 C.F.R. §§ 100.110, 100.120, 100.130. The Charging Party offers both "disparate treatment" and "disparate impact" analyses to prove its case. A

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[5]"Handicap" is defined, with respect to a person, as

> (1) a physical or mental impairment which substantially limits one or more of such person's major life activities,
> (2) a record of having such an impairment, or
> (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance. . . .

42 U.S.C. § 3602(h). *See also* 24 C.F.R. § 100.201. "Mental Impairment" is defined to include, *inter alia*, mental retardation. *Id.*

disparate treatment case "is the most easily understood type of discrimination." Some people are treated "less favorably than others because of. . .[their status as members of a protected class]. Proof of discriminatory motive is crucial. . . ." On the other hand, a disparate impact case involves practices "that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive. . .is not required. . . ." *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977).[6] For the reasons stated below, I find that Respondents have not engaged in discrimination under either analysis.

II. Jurisdiction

A. The Font Hill Loan Was a Residential Real Estate-Related Transaction Under the Act

As set forth above, the Act prohibits discrimination in "residential real estate-related transactions." That term is specifically defined to include "[t]he making . . . of loans. . .for purchasing. . .a dwelling. . . ." 42 U.S.C. §3605(b)(1). "Dwelling" is defined as "any building. . .intended for occupancy as, a residence by one or more families . . . ." *Id.* at § 3602(b). "Family" includes "a single individual." *Id.* at § 3602(c). "Residence" is not defined.

Contrary to Respondents' arguments, the Font Hill loan falls within the scope of the Act. In determining whether a subject property qualifies as a dwelling, the central inquiry is the intended duration of an occupant's stay. If an occupant considers the property a place that he or she intends to return to, rather than visit temporarily, the property will rightly be considered a residence. *Compare United States v. Hughes Memorial Home*, 396 F. Supp. 544, 548-49 (W.D. Va. 1975) (finding that a home for disadvantaged children qualified as a dwelling) *with Patel v. Holley House Motels*, 483 F. Supp. 374, 381 (S.D. Ala. 1979) (finding that a motel was a public accommodation and not a dwelling). L.I.F.E. intended to use the Font Hill property to establish a group home for mentally retarded adults. L.I.F.E. would collect payment for room and board

from the residents, provide very limited medical services, and otherwise transport the residents offsite for most medical care, job training, and other non-residential activities. No evidence was introduced that the proposed occupants of the Font Hill group home would have considered the property as anything but a residence. Mercantile's designation of the loan as "commercial," therefore, is irrelevant for jurisdictional considerations under the Act. The bank's internal policy of loan classification does not affect the intended use of the Font Hill property as a residence.

B. HUD Was Not Required to Refer L.I.F.E.'s Complaint to a State or Local Public Agency

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[6]Title VIII cases have adhered to the analytical framework of employment discrimination cases brought under Title VII of the Civil Rights Act of 1968. *See, e.g., HUD v. Blackwell*, 908 F.2d 864 (11th Cir. 1990). In employment discrimination cases there are two methods of proving discrimination: "disparate treatment" and "disparate impact." *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 666 n.10; *see also Familystyle of St. Paul, Inc. v. City of St. Paul*, 728 F. Supp. 1396, 1401 (D. Minn. 1990), *aff'd*, 923 F.2d 91 (8th Cir. 1991). While the first method is uniformly applied to and adopted by Title VIII cases, the second method has yet to be definitively and universally embraced in the housing discrimination area. However, as discussed *infra*, the United States Court of Appeals for the Fourth Circuit has applied the disparate impact analysis in Title VIII cases.

Under the Act, when a complaint alleges a discriminatory housing practice that is within the jurisdiction of a State or local public agency *and* where the agency has been certified by the Secretary, the Secretary is required to refer the complaint to the agency before taking any action. 42 U.S.C. § 3610(f)(1). Although L.I.F.E.'s complaint alleged a discriminatory housing practice within the jurisdiction of Maryland and Howard County, and agencies of that State and County have been certified by the Secretary, the applicable regulation contains an exception for the processing of complaints alleging handicap discrimination by those agencies. *See* 57 Fed. Reg. 1277-78 (Jan. 13, 1992);
24 C.F.R. § 115.6(d)(1)(ii). Therefore, HUD was not obligated to refer L.I.F.E.'s complaint alleging discrimination on the basis of handicap to any State or local public agency, and HUD properly proceeded to take action on the complaint.

III. Disparate Treatment

A Title VIII disparate treatment case may be established by a preponderance of either direct or indirect evidence. HUD has failed to prove by either direct or indirect evidence that Respondents discriminated against Complainant.

A. Insufficient Direct Evidence of Discrimination was Demonstrated

Direct evidence establishes a proposition directly rather than inferentially.[7] The Charging Party asserts that the most probative direct evidence that Mercantile did not close the Font Hill loan because of the handicap of the group home's residents was
Mr. Esposito's statements concerning the payment of additional collateral by L.I.F.E.

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[7]For examples of direct evidence of discriminatory intent, *see Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir.), *cert. denied*, 111 S.Ct. 515 (1990) (applicant was told that blacks were not allowed in the housing development and the development's Board considered strategies to exclude blacks); *Cato v. Jilek*, 779 F. Supp. 937 (N.D. Ill. 1991) (apartment owner stated that he "would like to kill [a white woman] for bringing a black man" to his property).

As detailed above, Mr. Esposito indicated that the additional collateral was required to address a concern that negative publicity would result if L.I.F.E. defaulted and handicapped persons were put out on the street.[8] To the extent the statements may have evidenced some discriminatory animus toward the handicapped, as discussed below, there is nothing in the record to indicate that once the additional collateral issue was resolved, such animus played any role whatsoever in Respondents' subsequent dealings with L.I.F.E.

According to Respondents, Mercantile did not close on the Font Hill loan solely because of the existence of the restrictive covenant, which, on the advice of counsel, precluded the necessary finding that the Font Hill property's title was clear and insurable. The continued existence of the covenant, Respondents assert, meant that neighbors of the Font Hill property could sue to prevent operation of the group home. Not only would Mercantile invariably be drawn into such litigation, but the income flow which Mercantile relied upon to service the debt would be impeded, and perhaps even ultimately halted. In light of such untenable risk, Respondents argue, Mercantile required that L.I.F.E. take any of three suggested steps to address the Bank's concerns with the covenant so that title insurance could be obtained and the loan could be closed.[9]

If L.I.F.E.'s operation of the Font Hill property as a group home was enjoined by litigation, income flow would cease. The only basis proffered by the Charging Party to dispute that it was standard practice for Mercantile to rely on income flow to repay a commercial loan[10] is the absence of a written formulation of such a policy. The Charging Party, however, has introduced no legal authority for the proposition that the existence of such a bank policy turns on its being memorialized. Moreover, the record is devoid of any evidence demonstrating that Mercantile has, on any occasion, deviated from its

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[8]These statements were made during discussions between Mr. Noto and Mr. Esposito concerning Mercantile's requirement that L.I.F.E. pledge additional collateral for the two loans. L.I.F.E. filed a complaint with HUD alleging discrimination based on this requirement. HUD determined that no reasonable cause existed to believe that such discrimination had occurred. (G 2). The determination, however, is not dispositive for the purposes of this proceeding insofar as it does not preclude consideration of the statements as direct evidence of discriminatory animus.

[9]In this regard, as discussed *infra*, I note there was no problem with providing the Centennial loan where there was no restriction on the title.

[10]The designation of this loan as commercial by Mercantile is relevant when considering which, if any, Bank policy was applicable. As stated *supra*, Mercantile's designation of the loan is, however, irrelevant for jurisdictional purposes, because in that regard, the appropriate inquiry is the intended use of the property.

policy. Thus, regardless of the availability of any other funds that L.I.F.E. could have used to repay the loan or any other potential source of payment, as long as the covenant remained a problem, Mercantile acted in conformity with its standard business practice when it refrained from closing on the Font Hill loan.

The Charging Party argues that L.I.F.E. exercised one of the three options suggested by Mercantile to resolve the title problem, but that Mercantile unreasonably rejected that effort. Thus, according to the Charging Party, because the legislative history of the Act and Maryland law conclusively rendered the restrictive covenant void, the Bank should have proceeded to close on the loan without further requiring removal of the covenant. This argument fails because the legal authority presented by L.I.F.E. was not conclusive. While the legislative history of the Act mentions restrictive covenants, it does not explicitly address a covenant like the one attached to the Font Hill property.[11] On its face, the subject covenant did not prohibit the use of the property by a protected class, and was arguably enforceable. Maryland Code § 7-603 is also not conclusive because it pertains to zoning ordinances and not private restrictive covenants. Having failed to demonstrate that the legal authority relied upon by L.I.F.E. was conclusive, the Charging Party has failed to demonstrate that Mercantile's rejection of that authority was unreasonable and therefore suspect.

The Charging Party also asserts that Mr. Esposito's comments expressing Mercantile's disinterest in making "certain loans" in the future, and that Mr. Noto should not later ask the bank to make loans similar to the one he was seeking, are direct evidence of a discriminatory animus toward handicapped persons. However, the Charging Party has not shown that these statements refer to an unwillingness by Mercantile to loan money for group homes for the handicapped. These remarks could reasonably have been alluding to the Bank's aversion to making loans to State supported entities or to corporations that manage group homes of *any* type, neither of which implicates L.I.F.E.'s involvement with the handicapped. In short, Mr. Esposito's statements are not evidence, direct or otherwise, of Mercantile's policy toward handicapped persons.

Finally, Mercantile did close on the Centennial loan. Although its conduct with that loan is not a dispositive factor in this case, the circumstances strongly indicate Mercantile's willingness to loan money for the operation of a group home for the handicapped when no restrictive covenant interfered in the loan process. Furthermore, the February 20, 1991, decision by the Banking Executive Committee to approve the Font Hill Loan, whether or not it knew of the restrictive covenant, is additional evidence that the loan would have been granted if the covenant had not been present.

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[11]Neither is there conclusive support for the Charging Party's position in the language of the Act itself.

B. No Indirect Evidence of Discrimination was Demonstrated

Absent direct evidence of discrimination, the analytical framework to be applied in a fair housing case is the same as the three-part test used in Title VII employment discrimination cases, as set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). *HUD v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990); *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1451 (4th Cir.), *cert. denied*, 111 S.Ct. 515 (1990). Under that test:

> First, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. . . .Second, if the plaintiff sufficiently establishes a prima facie case, the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for its action. . . .Third, if the defendant satisfies this burden, the plaintiff has the
> opportunity to prove by a preponderance [of the evidence] that the legitimate reasons asserted by the defendant are in fact mere pretext. . . .

Pollitt v. Bramel, 669 F. Supp. 172, 175 (S.D. Ohio 1987) *(citing McDonnell Douglas*, 411 U.S. at 802, 804). The shifting burden analysis in *McDonnell Douglas* is designed to ensure that a complainant has his or her day in court despite the unavailability of direct evidence of discrimination. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1984) *(citing Teamsters*, 431 U.S. at 358 n.44).

In the instant case, the Charging Party has failed to establish a prima facie case of discrimination in financing based on handicap. Although, as Respondents acknowledge, L.I.F.E. has standing to bring this suit and qualified for the loan, contrary to the Charging Party's position, Mercantile did not deny the loan to L.I.F.E.[12]

Having discovered the title defect, Mercantile presented L.I.F.E. with three alternatives to resolve the problem: (1) L.I.F.E. could provide controlling legal authority that the restrictive covenant would not be enforced by a Maryland court; (2) L.I.F.E. could obtain the written approval of neighbors in the sub-division for its operation of the group home; or (3) L.I.F.E. could obtain a court order declaring the covenant void. According to the Charging Party, Mercantile effectively denied the loan by erecting insurmountable barriers to its approval. First, the Charging Party argues, Mercantile

[12]According to Respondents, the Charging Party also did not satisfy its burden to demonstrate that Respondents approved loans for similarly situated non-handicapped applicants. Having concluded that the Charging Party did not meet its burden to demonstrate that Mercantile denied the Font Hill loan, I need not consider Respondents' contentions that this additional element must be shown to establish a prima facie case of discrimination in financing and that the element has not been demonstrated in this case.

refused to accept the legal authority presented by L.I.F.E. which L.I.F.E. believed conclusively showed the covenant to be unenforceable. Second, according to the Charging Party, the latter two options were impractical by Mercantile's own admission.

The legal authority presented by L.I.F.E. was not, as a matter of law, sufficient to induce Mercantile to abandon its concerns regarding the restrictive covenant. As discussed *supra*, neither the Act, its legislative history nor, the Maryland zoning law relied upon by L.I.F.E. conclusively rendered the covenant void.

Although Mercantile acknowledged in the February 22, 1991, letter that obtaining the neighbors' written approval was "extremely difficult and. . .not a practical solution," it only represented that obtaining a declaratory judgment would "involve[ ] the delay and expense inherent in any litigation." Moreover, there is nothing in the record to indicate that when L.I.F.E. chose to forego any attempt at obtaining a court order, it had made any inquiry into the time or cost involved in obtaining a declaratory judgment. Thus, the Charging Party not only mischaracterizes Mercantile's advice, but fails to demonstrate that L.I.F.E. was justified in making no attempt to obtain a declaratory judgment on the grounds of impracticality. Accordingly, I conclude that Mercantile did not deny the loan, but merely conditioned granting it on resolution of the title problem, which has not been demonstrated to have been too difficult or impractical.

However, even if the Charging Party had made out a prima facie case, I would find no violation of the Act. As discussed *supra*, Mercantile's withholding of final approval of the Font Hill loan was not based upon discriminatory animus towards the handicapped. Rather, it was based on Mercantile's business judgment that operation of *any* group home, regardless of its occupants, would violate the restrictive covenant, and thereby expose L.I.F.E., not to mention itself, to potential litigation. Such exposure, especially in the absence of title insurance, ran counter to Mercantile's practice of relying on income flow as the source of loan repayment. It is under those defensible and unrebutted circumstances that Respondents chose not to lend into litigation. Thus, Respondents articulated a legitimate, nondiscriminatory reason for their actions, which the Charging Party has not demonstrated was pretextual.

IV. Disparate Impact

The Charging Party asserts that Respondents violated the Act even absent a showing of prohibited intent to discriminate on the basis of handicap. Whether a

disparate impact is, by itself, a violation of the Act is not completely settled.[13] I need not decide this issue because the Charging Party has failed to establish a prima facie case of disparate impact.

To establish a prima facie case of disparate impact, a complainant must show "that a given practice has a greater impact on handicapped applicants than on non-handicapped ones." *Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002, 1007 (W.D.N.Y. 1990); *see also Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1288 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). Evidence of disparate impact "usually focuses on statistical disparities. . . ." *See Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 987 (1988).

According to the Charging Party, Mercantile's policy[14] of requiring that "all restrictive covenants limiting occupancy to single family residences be removed or declared void before [it] will approve a loan to purchase the property for any use other than a single family residence" disparately impacts upon handicapped persons. The Charging Party has introduced no evidence, statistical or otherwise,[15] indicating that Mercantile's policy requiring the removal of such facially neutral covenants has a greater impact on organizations operating group homes for the handicapped than on organizations operating group homes for non-handicapped occupants.[16] In the absence of such evidence, no prima facie case has been established.

Conclusion And Order

For the reasons discussed above, the Charging Party has failed to prove by a preponderance of the evidence that Respondents violated 42 U.S.C. § 3605, or 24 C.F.R. §§ 100.110, 100.120, or 100.130.[17] Accordingly, it is

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[13]However, most of the United States circuit courts of appeal, including the Fourth Circuit, have held that evidence of disparate impact, also referred to as discriminatory effect, is sufficient to establish a prima facie case. *See generally* Robert G. Schwemm, *Housing Discrimination: Law and Litigation*, § 10.4 (1991); *Robinson v. 12 Lofts Realty,* 610 F.2d 1032 (2d Cir. 1979); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055 (4th Cir. 1982); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983 (4th Cir. 1984); *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *United States v. Badget*, 976 F.2d 1176 (8th Cir. 1992); *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988), *cert. denied*, 493 U.S. 813 (1989).

[14]The Charging Party's assertion that no such policy exists because it is not formulated in writing is addressed and rejected, *supra*.

[15]Even though there may be circumstances where disparate impact can be shown without statistical evidence, there has been no demonstration that such circumstances exist in this case.

[16]According to the Charging Party, a violation should be found under a disparate impact analysis because, contrary to Respondents' contention that they did not *intentionally* discriminate against the handicapped, Respondents failed to introduce evidence that they acted the same way in an analogous situation not involving handicapped persons. This argument is misplaced because it confuses the elements of disparate treatment and disparate impact analyses. Moreover, even in a disparate treatment case,
the Charging Party's argument is misplaced since it improperly shifts the Charging Party's burden of proving discrimination onto Respondents by requiring Respondents to prove non-discrimination.

[17]Respondents' argument that HUD's failure to meet the 100 day deadline for determining reasonable cause enhanced any damages incurred by L.I.F.E. need not be reached because no violation of the Act is deemed to have occurred.

ORDERED, that the charge of discrimination is *dismissed.*

This **ORDER** is entered pursuant to 42 U.S.C. § 3612(g)(3) of the Fair Housing Act and the regulations codified at 24 C.F.R. § 104.910, and will become final upon the expiration of thirty (30) days or the affirmance, in whole or in part, by the Secretary within that time.

SAMUEL A. CHAITOVITZ
Administrative Law Judge